In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1092

CITY OF OAKLAND, a Municipal Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Ninth Circuit
and
SUPPORTING BRIEF

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The matter involved herein is the validity of a judgment rendered without either process, or appearance, or opportunity to defend—of a judgment that preceded process by a day.

This is an action at law brought in the United States District Court by the United States of America, respondent herein, at the instance of the Secretary of War, against City of Oakland, petitioner herein, to condemn a portion of the petitioner's municipally owned and operated waterfront lands, with the wharves, warehouses and other waterfront improvements thereon (Tr. 2).

The Complaint in Condemnation (Tr. 2) was accompanied by a Declaration of Taking (Tr. 14), and by a deposit of the estimated compensation (Tr. 16).

On the same day, upon which the above-mentioned documents were filed and said deposit made, namely, January 15, 1941 (Tr. 13, 16, 24), and without any process, or appearance, or any opportunity whatever given to the petitioner herein to be heard, the District Court rendered a final judgment of condemnation (Tr. 19), finally disposing of all judicial issues in the proceeding, except only the issue as to the amount of compensation.

On the following day (Tr. 19), namely, January 16, 1941, summons (Tr. 16) was served on the petitioner herein, in which summons the petitioner was advised (Tr. 17, 18) that it had thirty days within which "to appear and show cause why" its property "should not be condemned as prayed for in the complaint". The District Court directed (Tr. 24) that a certified copy of the judgment of condemnation be served with the summons. Thus, when the petitioner was served, it was advised, in effect, that, while it had thirty days within which to show cause why its property should not be

condemned, "here is a certified copy of the final judgment of condemnation rendered against you yesterday".

The petitioner's motion to vacate the judgment (Tr. 25), to the end that it might be given an opportunity to be heard on the judicial issue as to whether or not its property should be condemned, was denied by the District Court (Tr. 30), the order of denial being accompanied by a written opinion (Tr. 30).

The petitioner having appealed to the Circuit Court of Appeals from the order denying the motion to vacate, and from the judgment, the order and judgment were affirmed by the Circuit Court of Appeals (Tr. 65), the judgment of affirmance being accompanied by a written opinion (Tr. 52). The petitioner's petition for rehearing was denied.

This petition is presented for the purpose of securing a review by this Court of the judgment of the Circuit Court of Appeals, affirming the said order and judgment of the District Court.

II.

STATEMENT OF BASIS OF THIS COURT'S JURISDICTION.

The judgment sought herein to be reviewed is the judgment of the United States Circuit Court of Appeals for the Ninth Circuit (Tr. 65), affirming the judgment of the District Court (Tr. 19), in an eminent domain proceeding, condemning property belonging to the petitioner herein, and affirming the order (Tr. 30) of the District Court denying the petitioner's motion to vacate said judgment (Tr. 25).

The judgment of the Circuit Court of Appeals was entered January 14, 1942 (Tr. 65). The petitioner's petition for a rehearing was denied on February 18, 1942 (Tr. 66), on which last mentioned date the judgment became final.

This Court's jurisdiction is sustained by Section 240 of the *Judicial Code* (28 U. S. Code, Sec. 347).

III.

THE QUESTIONS PRESENTED.

The single question presented relates to the validity of the District Court's final judgment of condemnation, rendered on the day the action was commenced, without process, or appearance, or any opportunity whatever to defend.

This single question may be segregated, and stated in its separate parts, as follows:

(1) Is *any* judgment valid that is rendered against a party, without either process, or appearance, or opportunity to appear and to defend;

(2) Does any Act of Congress purport to authorize the District Court to render any judgment in an eminent domain proceeding, without notice to the defendant or before trial;

(3) Is the rendition of such a judgment contrary to express Congressional mandate contained in the conformity statutes; and,

(4) Does due process require that a property owner be given an opportunity to be heard before he is deprived of his property in an eminent domain proceeding.

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

It is respectfully submitted that there are three special, important and sufficient reasons for the allowance of the writ prayed for herein:

(1) It is the accepted and usual course of a judicial proceeding that a party defendant shall be served with process *today*, and that judgment shall be rendered against him *tomorrow*, if at all; the Circuit Court of Appeals has sanctioned herein a complete departure by the District Court from such usual and accepted course—a departure so basic that, while the petitioner was served with process *today*, judgment was rendered against it *yesterday;* such a departure, we respectfully submit, calls for an exercise of this Court's power of supervision;

(2) The decision by the Circuit Court of Appeals that the judgment, rendered without either process, or appearance, or an opportunity to defend, is a valid judgment, is in direct conflict with all applicable decisions, of which we are advised, of all courts of all civilized people, including the decision by this Court in the leading case of *Windsor* v. *McVeigh* 93 U. S. 274;

(3) If it be assumed that, because this is a proceeding in eminent domain, prosecuted by the United States with the aid of a declaration of taking, the question as to the right of the property owner to be heard, before he is deprived of his property by a final judgment of condemnation, is distinguishable from a defendant's right to be heard in other judicial proceedings, then we re-

spectfully submit that this is an important question of federal law, which has not been, but should be, settled by this Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of the case numbered and entitled on its docket, No. 9801, City of Oakland, a municipal corporation, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court be reversed by this Court, and for such other and further relief as may be proper.

Dated, Oakland, California, March 23, 1942.

CHARLES A. BEARDSLEY,
W. REGINALD JONES,
Counsel for Petitioner.

Appendix.

Appendix.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No.

CITY OF OAKLAND, a Municipal Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW.

Of Circuit Court of Appeals (Tr. 52-65; 124 F. 2d 959). Of District Court (Tr. 30-36; 37 ~~72~~ F. Suppl. 297).

II.

JURISDICTION.

A statement of the basis of this Court's jurisdiction is printed in subdivision II of the petition (page 3, supra).

III.

STATEMENT OF THE CASE.

Subdivision I of the petition (page 1, supra) comprises our statement of the facts of the case.

IV.

SPECIFICATION OF ERROR.

But one error is specified, namely, that the Circuit Court of Appeals erred in affirming the District Court's judgment (and the order denying the petitioner's motion to vacate that judgment), because that judgment was rendered without either process, or appearance, or any opportunity to defend.

V.

ARGUMENT.

Summary of Argument.

Our reasons for asking for the allowance of a writ of certiorari are the three reasons listed in subdivision IV of the petition (page 5, supra).

Briefly, these reasons are that, when the Circuit Court of Appeals affirmed the District Court's judgment, rendered without either process, or appearance, or any opportunity to defend, (1) it sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, (2) its decision was in direct conflict with

an applicable decision of this Court, and (3), if it is assumed—as the Circuit Court of Appeals apparently assumed—that prior decisions are not controlling, then the question, as to the right of the property owner to be heard on the judicial issues involved in an eminent domain proceeding, is an important question of federal law that should be settled by this Court.

We shall not argue herein the merits of the four "questions presented" (Petition, page 4, supra), although we deem it appropriate to suggest that the importance of those questions is a further reason for this Court to review this case.

Our argument herein will be presented in three subdivisions, directed to the three reasons, listed above, for the allowance of a writ of certiorari.

POINT A.

THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

There is nothing more basic and unalterable, in civilized man's administration of justice, than the requirement that no court shall render any judgment against a party, without first having given him an opportunity to defend. This requirement has been recognized by all men who cherish justice, at all times since man began to emerge from barbarism, and to devise the administration of justice, as a method of settling disputes between man and man, and between man and the State—as a substitute for primitive man's method of settling disputes—as a substitute for combats, for fights and for wars.

In rendering its judgment, the District Court departed completely from the accepted and usual course in judicial proceedings—a course as long-standing as the administration of justice itself. And, by affirming that judgment, and the order denying the motion to vacate that judgment, the Circuit Court of Appeals sanctioned such complete departure.

That such a departure calls for an exercise of this Court's power of supervision, is a proposition that does not appear to call for any further exposition.

POINT B.

THE CIRCUIT COURT OF APPEALS DECISION IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

Actual court decisions, to the effect that a judgment without an opportunity to defend is void, are rare, for the obvious reason that our judges simply do not knowingly render such judgments. In fact, it is necessary to go back to the excesses incident to our Civil War to find a judgment that prompted the rendition of such a decision.

In 1864, the District Court of the United States for the Eastern District of Virginia rendered such a judgment; it was rendered against a "rebel", to effect the condemnation of his property, because he was a "rebel", and as provided by an Act of Congress.

In *Windsor* v. *McVeigh* 93 U. S. 274, this Court decided that, because that judgment was rendered without giving the defendant an opportunity to defend, it was not

merely voidable, but "absolutely void" (page 282), and that such a judgment is "contrary to the first principles of the social compact and the right administration of justice" (page 277), and "a blot on our jurisprudence and civilization" (page 277) and "a solemn fraud" (page 281).

Because the decision of the Circuit Court of Appeals, that the District Court's judgment is a valid judgment, is in direct conflict with this applicable decision by this Court, is the second reason relied on by the petitioner for the allowance of a writ of certiorari herein.

POINT C.

IF IT IS SUI GENERIS, THE QUESTION AS TO THE RIGHT OF THE PROPERTY OWNER, TO BE HEARD IN AN EMINENT DOMAIN PROCEEDING, IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The Circuit Court of Appeals does not appear to question the soundness of the rule stated and applied in *Windsor* v. *McVeigh* 93 U. S. 274, supra. Its opinion (Tr. 52) does not refer to that decision, or to that rule. Nor does it cite any other decision by this Court, or by any other court, either supporting, or purporting to support, any claim of any distinction between the right of a defendant to be heard in such a case as this, and his right to be heard in any other case. Apparently, the Circuit Court of Appeals has treated this question as being *sui generis*.

If the question is not *sui generis*, it is governed by the rule applied in *Windsor* v. *McVeigh*, supra. If it is *sui generis*, it is an important question of federal law that has not been, but should be, settled by this Court. On either theory, the allowance of a writ of certiorari herein would appear to be proper.

The importance of the question, as to the right to a hearing in an eminent domain proceeding, before a permanent deprivation is adjudicated, is particularly evident in this case, involving as it does the attempted permanent deprivation of property, belonging to a municipality (Tr. 7)—an instrumentality of a sovereign State—and held in trust for the use of the people of the State for the necessary public purposes of commerce and navigation.[1]

Treating the question as being *sui generis*, the Circuit Court of Appeals decided that the judgment of condemnation was properly rendered forthwith, and without process or hearing, *solely because of the urgency of the needs of the United States*. It reasoned that the United States should be permitted

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1. *Constitution of California*, Art. XV, Sec. 3 (adopted in 1879): "All tide-lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet, used for the purposes of navigation shall be withheld from grant or sale to private persons, partnerships, or corporations". This constitutional provision makes the property involved in this proceeding subject to a perpetual "trust . . . in which the whole people are interested" (*Boone* v. *Kingsbury* 206 Cal. 148, 189, 273 Pac. 797, 815).

> "to proceed with necessary public works without being hampered by delays that might occasion great and irreparable injury" (Tr. 63).

It said that this petitioner

> "insists that it should have the right to halt the progress of the work until it can be heard in the various courts to prevent the Government from taking this necessary action. The sovereign state should not be reduced to such impotency" (Tr. 63).

And it reasoned that,

> "when the greatest combination of autocratic powers of all time is ruthlessly engaged in an attempt to strangle the liberties of the world, to delay action in achieving military objectives may well be fatal" (Tr. 63).

We shall not argue herein the merits of the question as to the right of a trustee for the people of a sovereign State, or of any other property owner, to be heard in an eminent domain proceeding prosecuted by the United States. But we deem it appropriate, in support of our claim that this question should be considered and decided by this Court, to list the following points, each of which appears to us to cast doubt on the soundness of the Circuit Court of Appeals' answer to this question, and all of which, we respectfully suggest, are of sufficient substance to justify a hearing by this Court, for the purpose of determining whether or not a departure should be permitted herein from what has heretofore been universally accepted as fundamental law:

(1) The Circuit Court of Appeals has failed to distinguish between (a) an order putting the condemnor

into possession *pending* final judgment, and (b) a final judgment of condemnation; while a delay in the first *would*, a delay in the second would *not*, "halt the progress of the work" (Tr. 63);

(2) The petitioner recognizes that both federal and state law gives the condemnor the right to immediate possession; the petitioner has never questioned that right of the United States in this case; therefore, the petitioner has never sought "to halt the progress of the work" (Tr. 63)—only "to halt" the final adjudication that it is deprived of its property in perpetuity;

(3) The Circuit Court of Appeals expressly recognizes the petitioner's right to be heard (Tr. 58); and it recognizes that "due process", as guaranteed by the Fifth Amendment, *requires* "that the owner be given an opportunity to be heard at some stage of the proceedings upon reasonable notice of the pending suit" (Tr. 64); from this it would appear to follow that the question is merely whether the guaranteed hearing should be accorded before, or after, the adjudication of the issue on which the hearing is guaranteed; but a hearing *after* judgment would take at least as long as a hearing *before* judgment—a factor that would appear still further to remove from the case the urgency element, so largely stressed by the Circuit Court of Appeals; and the petitioner is not particularly reassured by the suggestion of a hearing, *after* an adjudication of all the issues to which the hearing relates, (a) because no procedure for such a hearing is known to the law, and the Congress has never conferred on the District Courts jurisdiction to hold such a hearing, (b) because the suggestion does not

come from the *District* Court, which court concedes to the petitioner only the right to attack its adjudication, in a suit in equity, on the ground of fraud (Tr. 35), and (c) because the Circuit Court of Appeals failed to instruct the District Court to accord to the petitioner *any* hearing on *any* of the issues already adjudicated (Tr. 65); and,

(4) "When the greatest combination of autocratic powers of all times is ruthlessly engaged in an attempt to strangle the liberty of the world" (Tr. 63), it is not a propitious time for liberty-loving people to throw overboard anything so fundamental, and so vital to the preservation of their liberties, as the right to be heard before judgment; certainly, it is not a proper time for them to make such a sacrifice before the need therefor has been given full consideration by their highest court.

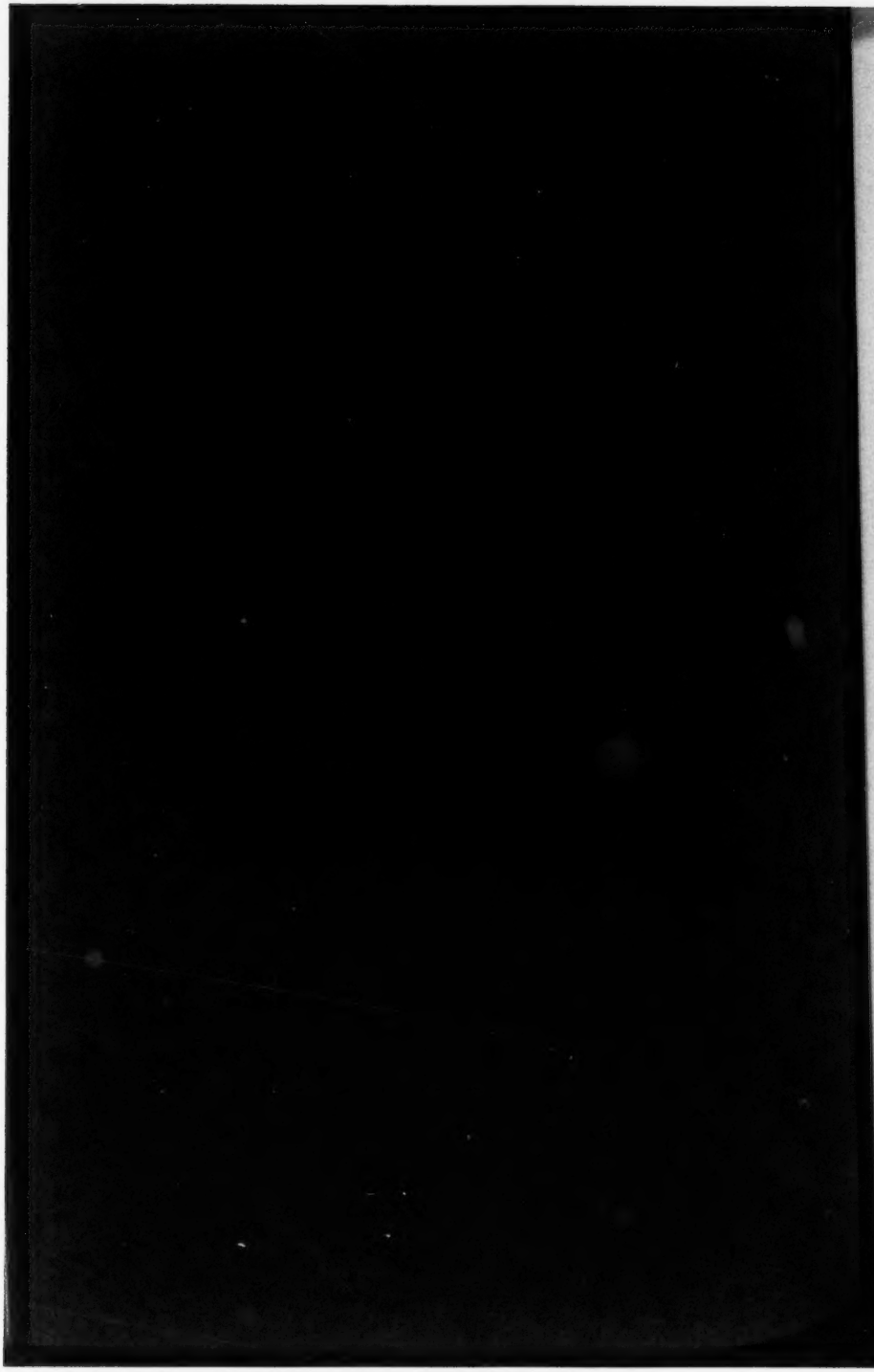
CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision of the Circuit Court of Appeals.

Dated, Oakland, California, March 23, 1942.

Respectfully submitted,

CHARLES A. BEARDSLEY,
W. REGINALD JONES,
Counsel for Petitioner.



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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1092

CITY OF OAKLAND, A MUNICIPAL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 30–36) is reported in 37 F. Supp. 297. The opinion of the Circuit Court of Appeals (R. 52–65) is reported in 124 F. (2d) 959.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 14, 1942 (R. 65–66). A petition for rehearing, filed February 10, 1942, was denied February 18, 1942 (R. 66). The petition for a writ of certiorari was filed March 31, 1942.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The United States filed in a federal district court a complaint to condemn land owned by petitioner. Pursuant to the provisions of the Declaration of Taking Act, the Government contemporaneously filed a declaration of taking and deposited with the court estimated just compensation for the property. Before issuance of a summons to petitioner, the court entered a judgment declaring that title to the land had vested in the United States under the statute and directing the surrender of possession to the Government. The question is whether the judgment thus given *ex parte* was authorized by the statute, valid under the Fifth Amendment, and consonant with the applicable provisions of federal conformity statutes.

STATUTE INVOLVED

Section 1 of the Declaration of Taking Act, approved February 26, 1931, c. 307, 46 Stat. 1421 (U. S. C. title 40, sec. 258a), provides:

> That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way

in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and establishd by judgment therein,

and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

STATEMENT

On January 15, 1941, the United States filed in the District Court of the United States for the

Northern District of California, Southern Division, a complaint in condemnation against 72 acres of land in Oakland, California, against petitioner—the apparent owner—and against other persons interested in the land (R. 2–13). The complaint alleged that the Secretary of War had determined that the land in question was needed for military purposes (R. 4–5); that its use was required immediately in order that necessary improvements might be begun at the earliest practicable date (R. 5); and that simultaneously with the complaint the Secretary was filing a declaration of taking and the United States was paying into the registry of the court $2,168,000 as the estimated just compensation (R. 12). The complaint prayed judgment condemning the land and awarding just compensation to those entitled (R. 12–13).

The declaration of taking, filed the same day, declared that it had become necessary to take the tract immediately, and stated that the sum estimated as just compensation had been deposited in the registry of the court (R. 14–16). Upon application of the United States (R. 19), the court on the same day entered judgment on the declaration of taking (R. 19–24).

The judgment recited the particulars in which it appeared to the satisfaction of the court that the requirements of the Declaration of Taking Act had been complied with (R. 20–21), declared that the fee simple title to the land had vested in the

United States upon filing of the declaration and deposit of the $2,168,000, and stated that "the right to just compensation for the property taken * * * [had contemporaneously] vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law" (R. 21–22). The judgment further declared that the United States was entitled to possession of the land sought to be condemned and directed the time and manner in which the United States should be given possession of the premises (R. 22–24).

Also on January 15, 1941, the court issued a summons directing petitioner to appear within thirty days and show cause why the property should not be condemned (R. 16–19). The summons was served January 16, 1941 (R. 19). On February 4, 1941, petitioner gave notice of motion to vacate the judgment on the ground that it was entered before process was served on the petitioner and an opportunity to be heard was given (R. 25–26). On March 6, 1941, the court denied the motion (R. 30). On appeal by petitioner the Circuit Court of Appeals affirmed the judgment and order (R. 65–66).

ARGUMENT

Petitioner contends (Pet. 4) that the District Court was without statutory authority to enter its judgment of January 15, 1941. The Declaration of

Taking Act, applicable in condemnation proceedings brought by the Government in any court of the United States outside the District of Columbia,[1] was enacted in order to permit the United States to acquire title to property the subject of condemnation proceedings before conclusion of those proceedings. Section 355 of the Revised Statutes[2] prohibits the expenditure of public money for public works until the Attorney General has certified that the United States has a good title to the site.[3]

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[1] An earlier act, approved March 1, 1929, c. 416, sec. 10, 45 Stat. 1415, 1417 (U. S. C., title 40, sec. 370), applicable only in the District of Columbia, provides the same method for acquiring title in condemnation proceedings brought in that jurisdiction. That statute has been held to make adequate provision for just compensation, and hence not to violate the Fifth Amendment, in *Lee* v. *United States*, 58 F. (2d) 879 (App. D. C.), and in *Potomac Electric Power Co.* v. *United States*, 85 F. (2d) 243, 246–247 (App. D. C.), certiorari denied, 299 U. S. 565. Likewise, federal court decisions have ruled that the Declaration of Taking Act adequately safeguards the constitutional right to just compensation. *Hessel* v. *A. Smith & Co.*, 15 F. Supp. 953 (E. D. Ill.); *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315, 322 (E. D. Ill.). Petitioner does not contend otherwise (see, *e. g.*, Pet. 2).

[2] This prohibition of section 355 appears at several places in the United States Code: title 33, sec. 733; title 34, sec. 520; title 40, sec. 255; title 50, sec. 175.

[3] There are some exceptions to the prohibition: (1) section 355, as amended by the Act of October 9, 1940, c. 793, 54 Stat. 1083, permits *purchase* of "low-value lands" as there defined subject to such infirmities of title as in the opinion of the Attorney General will not presently jeopardize the interests of the United States, and allows the expenditure upon such lands of limited amounts of public money; (2) the Act of

Prior to enactment of the statute of 1931, the United States generally acquired title to lands in condemnation only at the close of the proceeding, *i. e.*, after compensation had been ascertained, judgment entered, and, if appealed from, affirmed.[4] In consequence, until condemnation proceedings ended, the United States could not make improvements upon condemned lands. Urging prompt

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July 18, 1918, c. 155, sec. 5, 40 Stat. 911 (U. S. C., title 33, sec. 594), authorizes the Secretary of War to take possession of lands, etc. needed for an authorized river and harbor improvement and proceed with the public works authorized by Congress; (3) the Act of September 9, 1940, c. 717, 54 Stat. 872, 873, provides that all construction for the military establishment authorized prior to July 1, 1942, may be prosecuted prior to approval by the Attorney General of title to the required land to such extent as may be deemed advantageous by the Secretary of War.

The fact that the land in suit herein may come within exception (3), noted above, does not, of course, render inapplicable the Declaration of Taking Act; its broad purpose was obviously not limited to only those cases involving the problem of section 355.

[4] There were state statutes under which title to condemned property could be acquired pending determination of compensation, but, except for the Secretary of War, federal officers could not proceed under these statutes because they lacked authority to commit the United States to pay an award which might possibly exceed congressional appropriations. See Act of July 18, 1918, c. 155, sec. 5, 40 Stat. 911, (U. S. C., title 33, sec. 594); Act of July 2, 1917, c. 35, 40 Stat. 241, as amended (U. S. C., title 50, sec. 171). The availability of such state laws in any case would not affect the applicability of the Declaration of Taking Act. Cf. n. 3, pp. 7, 8, *supra*.

passage of the bill which became the Declaration of Taking Act, Attorney General Mitchell wrote to the Chairman of the House of Representatives Committee on the Judiciary:

> We have a number of cases now where the Treasury is ready to go ahead and construct public buildings * * *, but is unable to do so because appeals have been taken from the compensation awards and final judgment has thus been postponed * * * this proposed measure affords, in my opinion, the most important step that can be taken to expedite construction. [H. Rep. No. 2086, p. 2, S. Rep. No. 1325, p. 2, 71st Cong., 3d Sess.]

The committee report, recommending to the House of Representatives passage of the bill, stated:

> Operation under this measure will result in no hardship on the owners of property taken by the Government. Their rights are amply protected thereunder. By this bill it is sought merely to provide a means whereby the Government may take title immediately, and leave the amount of compensation to be determined by the court according to the usual procedure. [H Rep. No. 2086, *supra*, 1.]

The chairman of the Judiciary Committee stated to the House in debate that the measure—

> does not change the procedure so far as the jurisdiction or right to take over in condemnation proceedings is concerned.

> Wherever the United States rightfully and properly is taking condemnation proceedings under Federal statutes, then there is inserted this provision, that in such case the Government may take title at once by paying the money into court. [74 Cong. Rec. 778.]

It was recognized that acquisition of title by the Government was usually delayed by determination of the issue of just compensation. The effect of the 1931 statute is to eliminate that cause of delay.

The act itself provides for the vesting of title in the United States, and this occurred in the present case when the declaration was filed and the estimated just compensation was deposited. Accordingly, the judgment, entered after the United States obtained title by virtue of the statute, did not confer title. Even if, as petitioner requested (R. 25–26), the judgment had been vacated, no divesting of title would have occurred. The effect of the judgment was (1) to declare that title had passed to the United States and (2) to fix the time within which and the terms upon which possession of the land should be surrendered to the United States.

Petitioner concedes (Pet. 14) the validity of so much of the judgment as gives the Government possession of the condemned land. Equally it would seem that the remaining portion of the judgment was authorized: since the statute expressly empowered the District Court to enter an order giving the United States possession of the land, it was clearly

appropriate in connection with that order to enter a judgment reciting that, as the act also provides, title has passed to the United States. Such a judgment can be recorded and thus afford notice that the United States has become owner of the land in question. As the Circuit Court of Appeals stated:

> * * * The statute * * * declares that upon the performance of certain requirements the condemnation shall be effective. The judgment of the [trial] court here merely recites that it has found that these requirements have been met. * * * the court is required to fix the time and the terms upon which defendant shall surrender possession, which all implies that the court must first express its judgment, that the requirements of the statute have been complied with. * * * To advise the * * * [petitioner] of the action that has been taken certainly does not adversely affect the enforcement of its rights. [R. 60.]

The contention of petitioner that the judgment of the District Court exceeded its statutory authority would have substance only if entry of the judgment foreclosed petitioner in respect of some issue that it is entitled to raise in the proceeding. Cf. *Windsor* v. *McVeigh,* 93 U. S. 274, 277. Petitioner necessarily admits (Pet. 2) that it is not precluded as to the issue of just compensation. But it argues that entry of the judgment constitutes a disposition of all other issues of the case (Pet. 2, 4, 14) and consequently prevents it from establish-

ing, if possible, that the Government is not entitled to condemn the property.

There is no warrant for ascribing this effect to the judgment and therefore no basis for petitioner's argument. Petitioner's rights were not affected by entry of the judgment. As we have pointed out (*supra,* page 10), the judgment did not confer title on the United States. Nor did it cut off adversary judicial inquiry into the validity of the taking; section 1 of the Declaration of Taking Act is premised upon a valid condemnation proceeding. In the words of the Chairman of the House of Representatives Committee on the Judiciary, quoted above at page 10:

> * * * Wherever the United States *rightfully* and *properly* is taking condemnation proceedings under Federal statutes, then there is inserted this provision, that *in such case* the Government may take title at once by paying the money into court. [Italics supplied.]

In other words, title passes only if the United States has power in the particular case to take title. Thus, despite the declaration of taking and judgment on the declaration, the defendant in eminent domain will have full opportunity to urge any defenses to the suit that it may raise in its answer to the complaint in condemnation. These defenses will be passed upon before the amount of just compensation is determined; and, as both

courts below made plain (R. 35, 59), if the defendant establishes that the complaint must be dismissed, the declaration will fail.[5]

In this view of the case, the judgment complained of raises no question under the Fifth Amendment, as contended by petitioner (Pet. 4), since the judgment did not deprive the petitioner of any property and did not foreclose subsequent defense by petitioner to the suit on any ground. Cf. *Windsor* v. *McVeigh, supra.*

Petitioner's contention (Pet. 4) that the District Court's entry of judgment *ex parte* in the present case runs contrary to the mandate of the federal conformity statutes[6] is likewise founded on the assumption that the judgment determined all is-

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[5] Preservation of whatever defenses to a taking which an owner may have is not inconsistent with the Declaration of Taking Act and does not impair its utility. Only in rare instances is there any question of the power to condemn. As a result, it is ordinarily certain that the United States will ultimately obtain title. In the usual case, the acquiring authority may, in order to expedite the construction of public works, file a declaration of taking and thus secure title before final judgment. In the unusual case, where there is doubt of the constitutional power or of the statutory authority to condemn, it is unlikely that a declaration, which may turn out to have been futile, will be filed.

[6] Petitioner in its brief in the Circuit Court of Appeals cited section 914 of the Revised Statutes (U. S. C., title 28, sec. 724), section 2 of the Act of August 1, 1888, c. 728, 25 Stat. 357 (U. S. C., title 40, sec. 258), and section 1 of the Act of August 18, 1890, c. 797, 26 Stat. 316, as amended (U. S. C., title 50, sec. 171) (Br. 15). These statutes have not been superseded with respect to condemnation trials by the Federal Rules of Civil Procedure. Rule 81 (a) (7).

sues in the condemnation proceeding except that concerning compensation (see Pet. 2, 4; C. C. A. Br. 17–18). The Circuit Court of Appeals held (R. 64–65) that the procedure followed by the District Court, when its nature and effect are correctly viewed, conformed to the requirements of the California practice.[7]

We think it clear, then, that petitioner has no ground to complain of the judgment entered by the District Court on January 15, 1941, and should now be required, as the courts below have held, to answer on the merits the Government's complaint in condemnation.

CONCLUSION

The decision of the Circuit Court of Appeals is plainly right; it presents no conflict, as alleged (Pet. 5), with a decision of this Court. The question raised by petitioner is insubstantial, and does not call for further review either as a question of general importance or as disclosing such a departure by the federal courts from the usual and accepted course of judicial proceedings as to require

[7] In the event of any inconsistency between state procedure and the provisions of a federal statute, the latter, of course, are controlling. *Luxton* v. *North River Bridge Co.*, 147 U. S. 337. In consequence, the Declaration of Taking Act herein must prevail in the case of any conflict between California procedure and that followed by the District Court, which, as we have pointed out (*supra*, pages 10–13), was authorized by the federal act.

this Court's supervision. It is therefore respectfully submitted that the petition should be denied.

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(23)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1092

CITY OF OAKLAND, a Municipal Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

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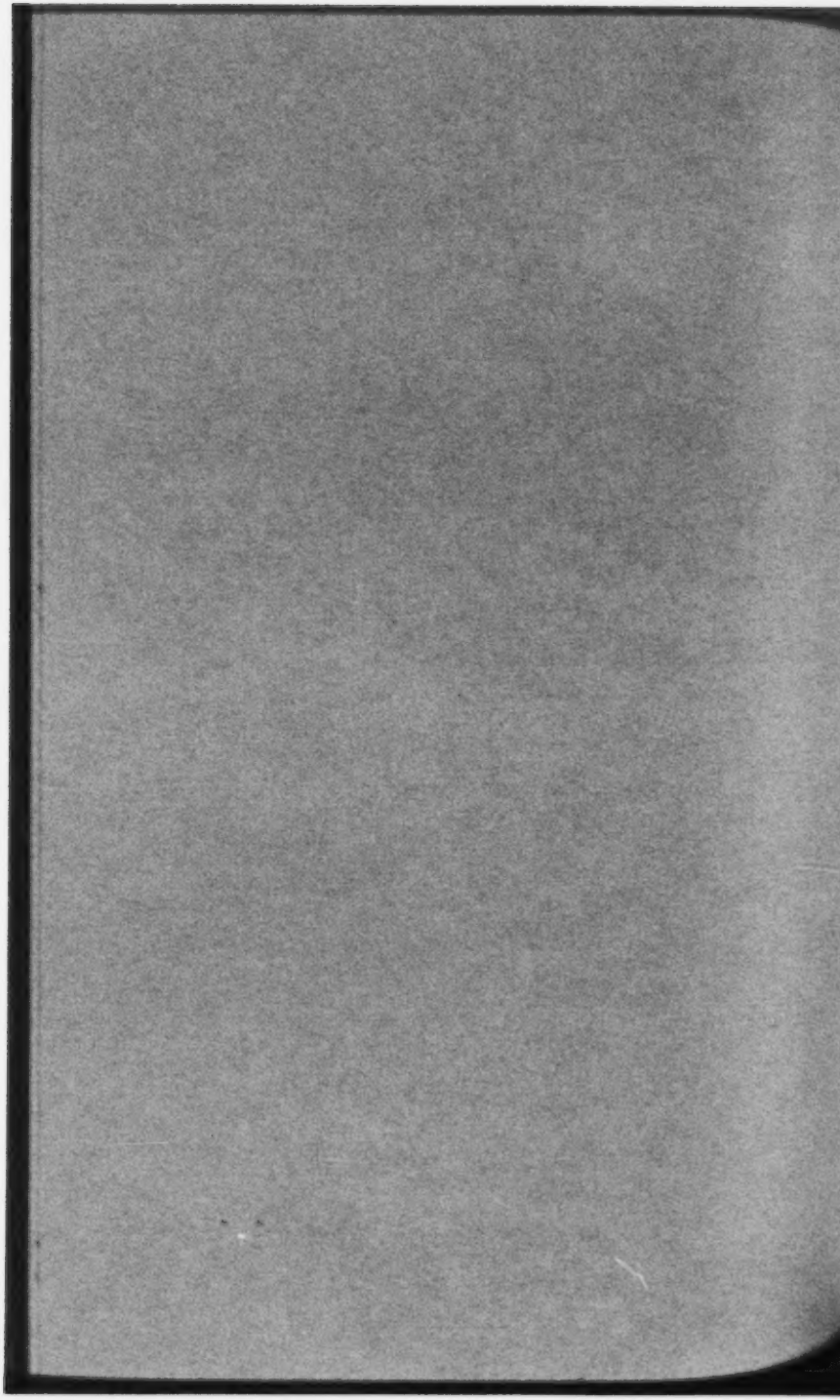

SUBJECT INDEX

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PETITIONER'S REPLY BRIEF

INTRODUCTORY STATEMENT.

This brief is respectfully presented in reply to the Brief for the United States in opposition to the granting of the Petition for a Writ of Certiorari.

The Opposing Brief, appears to us to deal principally with the merits of the points as to which the petitioner seeks a decision by this Court, and only incidentally with the reasons, advanced in the Petition and Supporting Brief, for a hearing and decision by this Court. This

reply will be addressed to those reasons, and to respondent's treatment thereof.

We shall use herein the same headings used in our Supporting Brief (pages 9-11).

POINT A.

THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The respondent does not dispute, and obviously cannot dispute, the proposition that, according to the accepted and usual course of judicial proceedings, a defendant is given an opportunity to be heard before judgment is rendered against him. Nor does the respondent deny that the Circuit Court of Appeals sanctioned a complete departure from such accepted and usual course. The respondent expressly admits the departure.

But it argues that the departure is wholly lacking in significance, and that consequently it would not justify the exercise of this Court's supervisory power, because "Petitioner's rights were not affected by entry of the judgment" (page 12), and because the judgment did not "cut off adversary judicial inquiry into the validity of the taking" (page 12), and because the petitioner "will have full opportunity to urge any defenses" (page 12).

It may be noted that respondent's assurances, in reference to the lack of effect of the judgment—its assurances that the judgment is wholly lacking in effect—are not supported in the opposing brief, either by any

court decision, or by any text writer, or otherwise, and that they are directly opposed to the universally accepted doctrine of *res judicata*. It may be noted further that the hearing visualized by the respondent is not provided for by any Act of Congress, and is wholly unknown to the law. It is also significant that the District Court did not endorse these assurances, or any of them, since it conceded to the petitioner merely the right to attack its judgment on the ground of fraud (Tr. 35), and that the Circuit Court of Appeals failed to direct the District Court to give effect to any of these assurances (Tr. 65, 66).

The petitioner does not regard these novel and unsupported assurances by opposing counsel as a sufficient guarantee that it will not be prejudiced by the District Court's *ex parte* judgment.

And, even if these assurances could be taken at their face value, there would still be presented herein a complete and unprecedented departure from the accepted course of judicial proceedings—a departure so basic as to call for a hearing in this Court, and for an exercise of this Court's power of supervision.

POINT B.

THE CIRCUIT COURT OF APPEALS DECISION IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

In our Supporting Brief (pages 10-11), we pointed out that the decision sought herein to be reviewed is in

direct conflict with the decision by this Court in *Windsor* v. *McVeigh* 93 U. S. 274.

The opposing brief contains no reply to this second reason for the granting of the petition, except the unsupported assertions (pages 11, 13), similar to those discussed under Point A, supra, that the judgment of the Circuit Court of Appeals did not foreclose "petitioner in respect of some issue that it is entitled to raise in the proceeding", and "did not foreclose subsequent defense by petitioner to the suit on any ground".

We respectfully submit that these assertions by counsel are not of sufficient substance to meet the issue that the decision of the Circuit Court of Appeals, that the District Court's judgment is valid, is in direct conflict with this Court's decision that the District Court's judgment against McVeigh, similarly rendered without an opportunity to be heard, was "absolutely void" (page 282), "a blot on our jurisprudence and civilization" (page 277), and "a solemn fraud" (page 281).

Apparently opposing counsel do not deny that the judgment, affirmed by the Circuit Court of Appeals, would be the same kind of a judgment as the one thus characterized so accurately and pointedly in *Windsor* v. *McVeigh*, supra, *if this judgment has any effect.* But, if it has no effect, why should it have been rendered in the first place? And why should it not have been vacated? And why should it have been affirmed? And why do counsel now ask this Court to sanction its rendition?

We respectfully submit that the conflict with this

Court's decision in *Windsor* v. *McVeigh* is direct and is real, and that, for this second reason, the petition should be granted.

POINT C.

IF IT IS SUI GENERIS, THE QUESTION AS TO THE RIGHT OF THE PROPERTY OWNER, TO BE HEARD IN AN EMINENT DOMAIN PROCEEDING, IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

We find in the opposing brief no direct reply to this, the third, reason presented in the supporting brief (pages 11-15) for the granting of certiorari herein.

Apparently counsel regard the question as being *sui generis*—as being one that is not answered by this Court's decision in *Windsor* v. *McVeigh*, supra. And apparently they concede that, if it is *sui generis*, it is not a question that has been settled by this Court.

It appears to us that the question presented, if *sui generis*, is of sufficient importance to justify its consideration by this Court, and that, for this third reason, the petition for a writ of certiorari should be granted.

Dated, Oakland, California, April 28, 1942.

Respectfully submitted,

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Counsel for Petitioner.